

The United States has legitimate security concerns and responsibilities which it cannot neglect. No one is suggesting that it should. Certainly some of the invading countries had reason to be alarmed by the confusion and disorder that was engulfing Grenada at the time of the invasion, but armed invasion was not the only possible response, nor necessarily the best. However desirable the end achieved by the invasion of Grenada may have been for some governments, it is still very difficult to justify the use of regional agencies or arrangements so as to circumvent article 2(4) under the guise of regional peacekeeping action.

### *Conclusion*

Specific instances of impermissible threat of use of force do not stem from any gaps in article 2(4). The prohibition is formulated in very clear terms.

However, the Charter treats such prohibition in the context of a comprehensive collective-security system and the recourse to methods of peaceful settlement of disputes. All aspects of that system are interrelated and equally important.

Therefore, from a strictly legal perspective, the development of a rationale for the effectiveness of the principle of the nonuse of force shall entail, *inter alia*, improving the functioning of the collective security system of the United Nations and the recourse to methods of settlement of disputes. It would not be realistic, however, to expect such an outcome at the present time.

On the other hand, from a close examination of recent—and not so recent—cases, one can hardly argue that article 2(4) is unworkable or outdated.

To consider article 2(4) as unworkable would be equivalent to allowing force as an instrument of international policy. That, of course, would constitute an impermissible conduct, even in the case where it is designed simply to preserve a sphere of influence or, as Professor Reisman would say, to maintain critical defense zones.

### ARTICLE 2(4): THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW

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"It always lies within the power of a state," the American doctrinalist Charles Cheney Hyde wrote in 1922, even after the formation of the League of Nations, ". . . to gain political or other advantages over another, not merely by the employment of force, but also by direct recourse to war."<sup>1</sup> Under traditional international law, war was a licit instrument both for vindicating international rights and for changing them. Under this regime, each state enjoyed a *jus ad bellum*, a right to resort, at its discretion, to war or lesser forms of coercion. Other doctrines, for example, about acquisition of territory by virtue of occupation and effective control, were consistent with this authoritative acknowledgment of the legitimate unilateral and discretionary use of force.

A system of unregulated violence—in which, in the language of the Old Testament, "each man did that which was right in his own eyes"—is inimical to optimally productive human interaction and, of course, loathsome to all but the morally defective. From Bodin and Hobbes on, the international situation was viewed by many as unde-

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<sup>1</sup>HYDE, *INTERNATIONAL LAW*, at 189 (1922).

sirable and, most important, susceptible to change. During this period incipient efforts were made to distinguish between lawful and unlawful coercions. Julius Goebel has suggested that in the 18th and 19th centuries coercion could be used to change ordinary rights but not constitutional arrangements expressed in the so-called "public law" of Europe.<sup>2</sup> The proposition is dubious in the light of contrary practice, as I argued in "The Struggle for the Falklands," 93 YALE L.J. 287 (1983). More effective distinctions were drawn in the 19th century. As war activated a contingent body of law with massive economic consequences, interdependent trading nations found beneficial more variegated doctrines giving them flexibility in characterizing coercion. In negotiations in the aftermath of the *Caroline* affair, for example, the United States and the United Kingdom concurred on the conditions which would warrant a state to resort to forceful self-defense: a necessity which is "... instant, overwhelming, and leaving no choice of means, and no moment for deliberation."<sup>3</sup> Presumably one of the functions of this doctrine in the context in which it was installed was to permit states to avert the conclusion that another state's resort to coercion was an act of war. They could thereby avoid the requirement of a major response.

Additional efforts to restrict the discretionary right to resort to force were mounted in Convention (II) Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts (1907), the so-called Porter Convention. The Treaty for the Renunciation of War (the Kellogg-Briand Pact of 1928) condemned "recourse to war for the solution of international controversies" and renounced it "as an instrument of national policy." More than 60 states became party to it. It is still in force but the relative consensus on values and their allocation shared by its drafters has long since disappeared. The Nuremberg Charter for the trial of war criminals established by the London Agreement expanded part of the Kellogg-Briand conception. In article 6, a "crime against the peace" was defined to include

... planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements, assurances, or participation in a common plan of conspiracy for the accomplishment of any of the foregoing.

The International Military Tribunal held in its judgment that

... to initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.

Note that these developments did not assume an absolute ban on the use of the military instrument, but only a ban on war for certain objectives or in violation of specific agreements.

The trend we are reviewing changed significantly in the U.N. Charter, which introduced to international politics a notion going beyond Kellogg-Briand and Nürnberg: a general prohibition of the unilateral resort to force by states. The principle was enshrined, in its most authoritative form, in article 2(4) of the U.N. Charter:

All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

To understand this provision it is important to place it in its context. There have always been crackpot devotees of violence, whether in the poisonously clinical style of von Clausewitz, von Jhering's weird celebrations of struggle or the war eulogies of the

<sup>2</sup>J. GOEBEL, *THE STRUGGLE FOR THE FALKLAND ISLANDS* (1927).

<sup>3</sup>2 MOORE, *DIGEST OF INTERNATIONAL LAW* 412 (1906).

Social Darwinists. International law had tolerated unilateral resort to coercion, not for the ecstasies of violence but for a simple and ineluctable reason. In the absence of organized and effective community processes for enforcing international rights and, where appropriate, changing them, aggrieved states had no alternative but recourse to their own means. In this situation, the alternative to self-help conducted with the level of coercion the self-helper deemed appropriate and necessary was no-help. In the traditional coarchical system of international relations, the justification and function of unilaterally initiated war—vindication of international rights and revision of existing law—was thus inescapable due to the absence of any centralized authority capable of performing these functions. In such a context, an injunction like article 2(4) would have been an implausible Utopian expression had it stood by itself.

From the drafting of the League of Nations Covenant, every effort to limit the *jus ad bellum* has necessarily been accompanied by efforts to solve the structural problem. The U.N. Charter clearly identified the structural defect of the international political system and created a network of institutions and procedures to deal with it. Rather than standing by itself, article 2(4) was part and parcel of a complex collective security system, more aspiring than its predecessors and grounded in the political realities that prevailed at the time of drafting. The Charter established a Security Council on which the members of the United Nations conferred “primary responsibility for the maintenance of international peace and security” (article 24(1)). The Charter regime authorized the Council to “determine the existence of any threat to the peace, breach of the peace, or act of aggression” and to recommend or decide appropriate measures to maintain or restore international peace and security (article 39). When the Council exercised this competence, all members of the United Nations were bound “to accept and carry out the decisions of the Security Council” (article 25). The measures available to the Security Council to implement these decisions ranged from those not involving the use of armed force to those involving positive coercion through the military instrument. This was to be effected by calling upon national units which were to be made available to the Council by special agreement. A Military Staff Committee was established to advise the Council.

Thus the Charter contemplated collective and effective U.N. execution of Council decisions maintaining or restoring international peace. Consistent with this new centralized international enforcement agency, the justification of unilateral resort to coercion by states should have disappeared. Hence article 2(4) quite logically prohibited it in the most general terms as a basic principle of the Organization. As a corollary, article 2(5) affirmed the commitment of member states to lend assistance to the United Nations and to refrain from assisting states “against which the United Nations is taking preventive or enforcement action.”

At this stage of our analysis, it is important to emphasize that article 2(4) was never an independent ethical imperative of pacifism. To be sure, there is a preference in all enlightened legal systems for persuasion over coercion, compelled, if not by humanity or, as some would argue, by the very nature of law, then by economy. The trend culminating in article 2(4) certainly represents the formal installation of that policy. But that is not a philosophical renunciation of coercion. In the instrument in which article 2(4) appears, there is full acknowledgment of the indispensability of the use of force to maintain community order. It was in the context of the Organization envisaged by the charter and not as a moral postulate that article 2(4) acquired its cogency. If the Organization operated according to its terms, it would have obviated the need for unilateral recourse to force and effectively sanctioned states if they still sought to

use force unilaterally. Claims worthy of international protection would have received it from the international community.

# I

There is no need to recite yet again the desuetude of the collective security arrangements envisioned in the Charter. Intractable conflicts between contending public order systems with planetary aspirations paralyzed the Security Council. With rare exceptions, the Charter's security mechanisms proved ineffective. The situation was reminiscent of the standard American morality play: A town in the "Wild West" in the 19th century without a sheriff, good people, perforce, carrying their own weapons and protecting their rights as they saw fit. A sheriff comes to town and announces that he brings with him law and order. As he will, henceforth, enforce the law, individuals no longer need carry weapons and the town need not tolerate the individual resort to force to protect personal rights. Presumably all good people would be delighted by this constitutional change and would accept and insist on compliance with the new norm prohibiting the unilateral use of force. Suppose, however, that within six months it became clear that the sheriff was utterly incapable of maintaining order. The rule against unilateral force which he had installed might continue on the books, but it is difficult to believe that even the best of citizens would refrain from the techniques of self-help in matters vital to themselves or their families that had prevailed before the sheriff's arrival.

Unfortunately, this is essentially what happened in the international political system. Within five years of the creation of the Organization, a pattern, to be repeated thereafter, was established according to which unilateral violations of article 2(4) for acceptable international purposes might be condemned verbally but to all intents and purposes validated, with the violator enjoying the benefits of its delict. A curious legal gray area extended between the black letter of the charter and the bloody reality of world politics. Article 2(4) notwithstanding, a coordinate code of permissible and impermissible unilateral coercions developed. A practical distinction between major and minor coercions was developed, the former likely to lead to global war, the latter not. But even for these, judgments about lawfulness or permissibility were required.

The new pattern became apparent as early as 1949, with, *mirabile dictu*, the sanction of the International Court of Justice. In the *Corfu Channel* case ([1949] ICJ 4), the United Kingdom sued Albania for allegedly placing mines in straits which, the United Kingdom averred, were an international waterway. At one stage, the United Kingdom, without international authority, swept the straits, took the mines and sought to submit them to the International Court as evidence of the Albanian delict. The United Kingdom thus initiated a claim of a right of self-help when asserted legal rights could not otherwise be vindicated. Albania objected that the United Kingdom had no right to enter its territory to seize the mines; hence, they should not be admitted as evidence. The Court condemned the United Kingdom for violating Albanian sovereignty by seizing the mines but imposed no other sanction, admitted the mines as evidence, and thereby confirmed the United Kingdom case. In sanctioning the British self-help with a slap on the wrist, the message was clear: some unilateral assertions of international rights might be condemned in the most trivial and innocuous fashion, but the perpetrators would nonetheless be permitted to benefit from their actions.

The resort to forceful unilateral action for self-determination and decolonization was not uncommon. Nasser's action in the Suez Canal was a watershed. Indonesia seized West Irian from the Dutch, claiming that it was colonized territory to which it was entitled. The United Nations temporized, creating a face-saving interim for the

Dutch but acquiesced in the Indonesian action. India seized Portuguese enclaves in the subcontinent. To all intents and purposes the international community acquiesced.

From the perspective of a scholar, it is clear that a very complex message was being modulated. It did not say that all self-help was unlawful. Nor did it say that everything was permitted. A highly articulated code regarding the lawfulness of the unilateral use of force developed, according to which responses to particular actions were determined by reference to many features: the precipitating events, the substantive international legal issues, the stakes for the different actors, the alternatives for peaceful resolution and the extent to which they had been explored, the consequences of inaction for different parties and so on. In addition, factors such as the level of violence employed, the likelihood of proliferation and, perhaps, general compliance with the laws of war appear to have been taken into consideration. A special exception appears to have been made for self-determination and decolonization, though the definition of these terms was often selective. In sum, the international attitudes toward lawful unilateral forceful action are, I hope to show, much more complex than editorial writers in the *New York Times* and the *American Journal of International Law* equipped with a copy of the U.N. Charter would lead one to believe.

The tension between stable practice, on the one hand, and the Charter provision and a body of authoritative instruments illuminating it, on the other, has led a number of scholars to seek an accommodation for determining when the unilateral resort to the military instrument is lawful by relying increasingly on the aggression-self-defense dialectic. Given the structural problems already mentioned, the effectiveness of this distinction requires a rather precise conception of aggression. In fact, an examination of the key documents that purport to define aggression indicates some acknowledgment of the more complex reality and legal dilemmas created by the relative ineffectiveness of the international collective security system. The General Assembly's definition of aggression, for example, provides a conception in some ways even broader than that implicit in article 2(4) of the charter which it purports to illuminate. Nevertheless, the definition concedes in its preambular statement that "the question whether an act of aggression has been committed must be considered in the light of all the circumstances of each particular case . . . ." (G.A. Res. 3314). At critical moments, the United Nations, responding to claims of aggression, has used that characterization cautiously. Thus, in the Falklands war, the Security Council refused to characterize Argentina's invasion as "aggression" but called the situation a "breach of the peace" (Res. 502).

One is tempted to say that we are encountering no more than a survival or revival of the right of self-help, *i.e.* the vindication of recognized rights by unilateral action. In fact, it is more complicated, for contemporary international law includes many "aspirational norms" accompanied by general obligations to behave in ways likely to aid in their realization (consider, for example, charter articles 55 and 56) and what we might call "appraisal norms" which require continuing judgments about situations in terms of an international standard with an accompanying obligation to act to correct the situations if they depart from that standard (consider, for example, General Assembly Resolution 1514 (XV)). In addition to existing rights and obligations, international law also includes guidelines, privileges, and obligations for changing some existing patterns. In the absence of effective inclusive methods for securing these changes, these norms generate additional claims for unilateral action.

The net result of the ineffectiveness of the charter regime for general enforcement might be more accurately described as a partial revival of a unilateral *jus ad bellum*.

But in sharp contrast to the 19th-century conception, which was value neutral and ultimately power based, the contemporary doctrine relates only to the vindication of rights which the international community has recognized but has, in general or in a particular case, demonstrated inability to vouchsafe or secure. Hence appraisals of the resort to coercion by states cannot simply invoke article 2(4) and condemn them, but must test the permissibility or lawfulness of the action concerned by reference to a number of factors, including the objective for which and the contingency under which coercion is being applied.

A survey of international practice indicates that a number of objectives have been claimed as warranting unilateral resort to coercion. For some of these, elite consensus would appear broad based and deep. Others remain very controversial. In ensemble, they do not comprise a code, but a brief review of them may set the stage for a consideration of the policies that shape judgments of lawfulness in these matters and, hopefully, a sound procedure for construing article 2(4).

### *Self-Determination and Decolonization*

The General Assembly's Declaration on Principles of International Law Concerning Friendly Relations (Res. 2625, Oct. 24, 1970) is not an internally consistent document, reflecting as it does many of the complementarities of contemporary international politics. But in part of its discussion of the use of force, it reverses presumptions implicit in article 2(4) by characterizing certain existing situations as inherently unlawful, despite the fact that they may have been venerable and widely accepted until now. Pre-declaration article 2(4) prohibits the use of force to change political situations, transforming Kellogg-Briand into a functional and total prohibition. But under post-declaration article 2(4), force for sustaining a status quo which is colonial is unlawful: force against it is not. The declaration provides in one pertinent part that:

Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such people are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.

Presumably, only aggregates characterized as peoples by the General Assembly's Committee of 24 and fulfilling the requirements of Resolution 1514 (XV) would be entitled to benefit from this provision. Even with such a limitation *ratione personae*, it is difficult to resist the conclusion that contemporary international law and practice would appear to countenance a rather broad spectrum of coercions in vindication of this fundamental international right.

### *Humanitarian Intervention*

Humanitarian intervention, which I have discussed in more detail in "Humanitarian Intervention to Save the Ibos," in R. LILICH, *HUMANITARIAN INTERVENTION* (1973), is an extraordinary remedy, an exception to the postulates of state sovereignty and territorial inviolability that are fundamental to traditional theory. The validity of humanitarian intervention is not based upon the nation-state-oriented theories of international law but on an antinomic and equally vigorous principle, deriving from a long tradition of natural law and secular values: the kinship and minimum reciprocal responsibilities of all humanity, the inability of geographical boundaries to stem cate-

gorical moral imperatives and, ultimately, the confirmation of the sanctity of human life, without reference to place or transient circumstance.

I believe that the case can be made that the advent of the United Nations neither terminated nor weakened the customary institution of humanitarian intervention. In terms of its substantive marrow, the charter strengthened and extended humanitarian intervention, in that it confirmed the anthropocentric character of international law and set in motion a continuous authoritative process of articulating international human rights, reporting and deciding infractions, assessing the degree of aggregate realization of human rights, and appraising its own work. The preamble and critical first article of the charter left no doubt as to the intimate nexus that the framers perceived to link international peace and security and the most fundamental human rights of all individuals. Implementation machinery, alas, has not been commensurate, the sine qua non for and justification of unilateral action. Though humanitarian intervention has been invoked in a number of unilateral actions, it continues to be controversial.

### *Intervention by the Military Instrument for Elite Replacement*

On at least four occasions in the past 10 years, foreign military forces associated with another state have intervened in order to expel a government and install another in its place. This is a matter which is particularly important for our discussion. While the preceding two categories of claim do not arguably impinge on the political independence of the state suffering intervention, the manifest objective of this claim to unilateral use of force is not only to impinge on but change the political composition of the target state. Within the limits of time and space here and with your indulgence, the treatment must be somewhat more detailed. The problem may be stated concisely. Strict construction of the U.N. Charter and the General Assembly's Declaration on Aggression would appear to render interventions by the military instrument to secure replacement of the elite in the target state quintessentially unlawful. Though all of the recent cases were challenged in some authoritative arenas, the operational responses appear to have been more complex and have varied markedly.

In 1979, forces of Tanzania invaded Uganda, expelled the government of Idi Amin and ultimately restored the government of Milton Obote. Libyan forces stationed in Uganda at Amin's request tried unsuccessfully to support the Amin government, but withdrew. Amin had been belatedly but almost universally denounced for the atrocities committed by his government and there was widespread international feeling that the Tanzanian action, whatever its motivations, served a licit international purpose. As a result, Tanzania suffered neither condemnation nor sanctions. Though the United Nations was petitioned, it adopted a formal stance of benign obliviousness. On February 15, 1979, Libya asked the Secretary General to act promptly to secure a peaceful evacuation of Tanzanian troops. He did not. On March 5, the front-line states transmitted to the Secretary General a communique they had issued the preceding day condemning the Amin government for an unprovoked war of aggression it had initiated against Tanzania! On March 28, Uganda requested an urgent meeting of the Security Council "in connexion with the question of the aggression by the United Republic of Tanzania against the Republic of Uganda." On April 5, Uganda withdrew the request ". . . as a result of an appeal by the African Group in New York to the Government of Uganda that the meeting not be convened at this point . . ."

In 1979, French forces in a quick and bloodless coup expelled the government of Jean-Bedel Bokassa from the Central African Republic. Eight hundred French

soldiers stationed in Chad, Gabon and in France were flown in by plane and helicopter.

Like Babrak Karmal in Afghanistan, the French-designated successor to Bokassa, David Dacko, landed in Bagui, in a French military plane, only minutes before he read the prepared declaration deposing the Emperor and installing himself. The French Government denied any role in the organization of the action, a contention persuading no one, not least the French parliamentary opposition. Again there were no formal denunciations to speak of. To the contrary. The Central African representative, M. Bangui, insisted in the U.N. General Assembly that "...the outside assistance which the Central African Republic requested from France to maintain security throughout our country was quite proper." In the same paragraph, M. Bangui acknowledged that it was not the expelled Central African government that requested the intervention, but "... Central African patriots and democrats." The representative thanked France and remonstrated with the Organization of African Unity (OAU) and the United Nations for their "culpable silence"! And indeed Bokassa's atrocities had been confirmed by an Independent African Enquiry Commission in August 1979, convened at the Heads of State meeting at Kigali.

In 1979, the forces of the Government of Vietnam entered Cambodia and sought to unseat the Pol Pot government and to replace it with a Vietnamese supported government led by Heng Samrin. In quantitative terms, Pol Pot's atrocities probably surpassed those of Amin and Bokassa, but the condemnation of the Vietnamese action was sharper and did include a variety of sanctions as well as continuing refusal on the part of the United Nations to recognize the government installed in place of Pol Pot. The credentials of the representatives of Pol Pot to the United Nations have been accepted and those of the new regime have so far been rejected. In contrast to the Central African incident in which overt French presence ended rather quickly and the Ugandan incident in which the Tanzanian presence was withdrawn after a longer time, Vietnam has remained in Cambodia, playing a dominant role in the administration of the country. In all the cases, however, the intervener manifestly sought to play a large role, by virtue of its military presence, in the recomposition of the official elite. A factor which must be considered in the light of the following case, is the continuing resistance of the local population, for it suggests that if the externally imposed government does not have or acquire a real popular base, international appraisals are more likely to characterize the intervention as unlawful.

In 1979, Soviet forces entered Afghanistan in support of a government which, it would appear, would not have survived were it not for the intervention of a foreign military force. The Soviet action stimulated a war of national resistance to the Karmal government; this war has received both clandestine and open support from numerous states and has continued to be a subject of denunciations of varying clarity in the United Nations. The Security Council was convened but a draft resolution that said *inter alia* that a violation on any pretext of the principle of the territorial integrity and political independence of states was contrary to the aims and purposes of the charter and that deplored the armed intervention in Afghanistan, which won 13 votes, was vetoed by the U.S.S.R. (S/13729). The matter moved to the General Assembly which adopted by 104 to 18 with 18 abstentions a resolution calling for the immediate, total and unconditional withdrawal of foreign troops from Afghanistan to enable its people to determine their own form of government and choose their economic, political and social systems free from outside interference (Res. ES/62, Jan. 14, 1980). The U.S.S.R. has not complied and the Afghani resistance continues to date.



In 1983, the United States entered Grenada and installed a new government. The Security Council resolution calling for, *inter alia*, “. . . immediate cessation of the armed intervention and the immediate withdrawal of the foreign troops from Grenada” was vetoed (S/16077/Rev. 1, Oct. 27, 1983). The General Assembly did not issue a resolution.

The differences in international response to these interventions would suggest that there will be tolerance for military interventions which remove a government deemed to have lost its international authority through atrocities and violations of internationally recognized human rights, if the action is not used as a camouflage to change the international political alignment of the government. The international security concern to maintain basic zones and to view efforts at changing such zones as destabilizing, which I will examine in a moment, may account for the relative ease of general acceptance of the actions in Uganda and the Central African Republic and for the continuing appraisal of the interventions in Cambodia and Afghanistan. The Grenada incident would appear to have excited more controversy in the United States than abroad; the critical test there will be the consequences which are not, as yet, clear.

### *Use of the Military Instrument Within Spheres of Influence*

The term “sphere of influence” which fell into disuse with the rise of the United Nations has been openly used since 1980 by Western political leaders. Its invocation suggests that a rough allocation of the planet into defensive zones underlies their thinking and evaluation. The conception, when used to justify coercive interventions in the affairs of other states, is incompatible with the text of the U.N. Charter. Nevertheless, practice in Eastern Europe, the Caribbean and Latin America suggests that there is a greater tolerance for interventions in spheres of influence or critical defense zones. There are obvious reasons for this pattern of tolerance. Conflicts may erupt from mistakes and misperceptions. Because of the increasing speed, total destructiveness, and irrevocability of the contemporary instruments of violence, minimum world order requires that states communicate to their adversaries, clearly and in advance, exactly which parts of the planet they deem indispensable to their own security and, hence, which expansive political or military changes initiated by or enuring to the benefit of an adversary will be unacceptable and likely to lead to war. These processes of communication are complex. Not all that is demanded is deemed reasonable. Not all that is demanded wins acceptance. The areas referred to in such communications may be reciprocally accepted as what I have called critical defense zones (CDZs). In the past, failure to indicate such zones unequivocally may have contributed to the eruption of conflict.

Since World War II, explicit as well as tacit communication with regard to critical defense zones has been fairly routine. The Soviet Union has insisted on eastern Europe as a defense zone. Without explicitly conceding the propriety of the claim, the Western states have, in effect, complied with the demand. Even at moments of opportunity, such as the Hungarian uprising of 1956 and the Czech “spring” a decade later, the West exploited the events for propaganda value, but refrained from adventures or overt support. This part of the so-called Brezhnev doctrine has been accepted in practice. Conversely, the Monroe Doctrine and corollaries such as the Selden resolution may be viewed as the clearest communication by the United States to adversaries that expansions of power and changes in alliance pattern in the designated zones will be opposed by force. Smaller states have also communicated critical-zone messages to their adversaries with deterrent effect.

CDZs are not tantamount to proprietorship. Unlike spheres of influence in some earlier periods, they do not impart an option *erga omnes* to annex territory in the zone at some future time. Yet unquestionably, they attenuate the political discretion of elites in the states within the zone and limit the self-determination options of the rank and file there. In this respect, they are offensive to such basic policies of contemporary international law as self-determination and political independence of states, even though they resonate positively with urgent demands for the maintenance of global minimum order.

### *Treaty Sanctioned Interventions*

On a number of occasions, states have sought to intervene militarily by virtue of a bilateral or regional treaty. Such intervention treaties raise special problems in contemporary international law. A treaty between two or more states that purports to allow one state to interfere in the territory of the second state under circumstances to be determined only by the first state would in fact involve a permanent right of intervention in that state, for the interferences would be effected without regard to the conditions prescribed by international law for such actions.

Do treaties that authorize unlimited and untestable interventions by one state in the territory of another state violate *per se* contemporary international law, or should they be deemed to be of a provisional or even general lawfulness? What are the criteria for regional treaties allowing intervention? Given the stabilizing function performed by defense and latent war community treaties whose lawfulness may be derived from the U.N. Charter, should international law adopt a similarly permissive policy for intervention treaties? These are issues raised in such diverse cases as Iran-U.S.S.R. relations. Egypt-Sudan relations and in the Grenada case. There are marked differences between these cases, but the legal valence of the differences has yet to be gauged. They will require serious consideration.

### *Use of the Military Instrument for the Gathering of Evidence in International Proceedings*

In the *Corfu Channel* case, the International Court of Justice imposed a purely nominal sanction on the United Kingdom for using the military instrument to acquire evidence for international litigation, but permitted the evidence to be admitted and relied substantially upon it in finding in favor of the United Kingdom. In the *Diplomatic Hostages* case, the International Court appears, by implication, to have reversed its thinking on this matter. Hence, it is as yet unclear to what extent international law has developed a type of Fourth Amendment regarding the admissibility of evidence obtained by use of the military instrument.

### *Use of the Military Instrument for International Judgment Enforcement*

Article 94(2) of the U.N. Charter provides a centralized method for the enforcement of international judgments. But because the agency of enforcement is the Security Council, efforts at enforcement through the Council are likely to be paralyzed by the veto of a permanent member having a contrary interest. The experience in the *Diplomatic Hostages* case was mentioned earlier. Professor Quincy Wright suggested

a State can use armed force to defend its territory or armed forces against armed attack, to assist others that are victims of such attack, or to assist the United

Nations "to maintain or restore international peace and security" . . . or to enforce a judgment of the International Court of Justice.<sup>4</sup>

This general authorization does not appear to have received additional scholarly support.

## II

If, article 2(4) notwithstanding, some unilateral coercions are effectively treated as permissible or lawful, contemporary lawyers must begin to make express and to appraise the criteria of lawfulness of unilateral resorts to coercion.

The customary criteria for appraising the use of force—that a particular use be necessary, proportional and discriminating as to target—are indispensable for determining and appraising specific uses of force, but they are not helpful for the threshold question of assessing a unilateral resort to coercion itself. The customary criteria either presume the overall lawfulness of the action and concentrate on the methods by which it is accomplished or, in dualistic fashion, ignore the question of overall lawfulness as irrelevant. Procedural policies, such as the obligation to exhaust peaceful processes of dispute resolution prior to resorting to coercion, have been regular features in treaty regimes dealing with these problems since 1907. Part of their acceptability in a world of diverse values is that they are value neutral. This strength is also a weakness. If the exhaustion rule is not accompanied by substantive criteria, it serves as no more than a brief way station to violence, a heating up rather than a cooling off period, for the conventional peaceful processes of dispute resolution are mostly noncompulsory and generally ineffective.

A comparable policy against resort to coercion for relatively trivial issues rests on an assumption of a homogenous calculus of valuation. But our world is comprised of many phenomenologies. It is still difficult for North Americans to believe that the Falkland Islands are an important and urgent issue for Argentinians. Similarly, the obvious limit imposed by the need to maintain minimum world order through prohibiting otherwise lawful resorts to force, no matter what their justification, if they threaten to lead to major global conflict—a commonsense limit for those who cherish the survival of our species—does not help us to assess lawfulness in the many situations that fall well within that prudent safety zone.

Value-neutral criteria for appraising unilateral resorts to coercion such as conservation (presumably a legitimate ground for action) and expansion (presumably an illegitimate ground) exercise a similar attraction. If one could secure international agreement for the proposition that unilateral coercion may be used for conservation of a position or status but not for its expansion, limits will have been established without the need for agreement on values by contending public order systems. This is, of course, the dialectic which many scholars have found in charter articles 2(4) and 51 which was mentioned earlier. But the expansion-conservation distinction is premised on a static distribution of values, for it assumes that what particular communities have and hence are entitled to conserve is lawful. In fact, the international political community is not one of static valuation. Contemporary international law, as I have said earlier, contains aspirational and appraisal norms accompanied by privileges and obligations to act to initiate or accelerate certain changes. Part of what is extant has been characterized as pathological and actors have been authorized to seek change. Hence the determination of substantive criteria for appraising *jus ad bellum* is required.

<sup>4</sup>Wright, *Espionage and the Doctrine of Non-Intervention in Internal Affairs*, in *ESSAYS ON ESPIONAGE AND INTERNATIONAL LAW* 6-7 (Stanger ed. 1962).

I cannot develop a comprehensive set of guidelines for assessing lawfulness or permissibility of coercion in this setting, but I will suggest what I believe are the major principles of the U.N. Charter in this regard and relate them to our subject, article 2(4). The relative ineffectiveness of the Security Council coupled with the rather high degree of power sharing in many democracies means that many of you are participants in assessing lawfulness, for your reactions influence your government officials. Hence the search for criteria which I am proposing is not an academic exercise.

In the determination of any action, a key and constant factor—less a criterion of lawfulness and more a *sine qua non* of survival—is the need for the maintenance of minimum order in a precarious international system. Will a particular use of force, whatever its justification otherwise, enhance or undermine world order? When this requirement is met, attention may be directed to the fundamental principle of political legitimacy in contemporary international politics: the enhancement of the ongoing right of peoples to determine their own political destinies. That obvious point bears renewed emphasis for it is, in my view, the main purpose of contemporary international law; article 2(4) is the means. The basic policy of contemporary international law has been to maintain the political independence of territorial communities so that they can continue to be able to express their ongoing desire for political organization in a form appropriate to them. Article 2(4), like so much in the charter and in contemporary international politics, supports and must be interpreted in terms of this key postulate. Each application of article 2(4) must enhance opportunities for ongoing self-determination. Though all interventions are lamentable, the fact is that some may serve, in terms of aggregate consequences, to increase the probability of the free choice of peoples about their government and political structure. Others have the manifest objective and consequence of doing exactly the opposite. There is neither need nor justification for treating in a mechanically equal fashion Tanzania's intervention in Uganda to overthrow the Amin despotism, on the one hand, and Soviet intervention in Hungary or Czechoslovakia to overthrow popular governments and to impose an undesired regime on a coerced population, on the other. Here, as in all other areas of law, it is important to remember that norms are instruments devised by human beings to precipitate desired social consequences. One should not seek a point-for-point conformity to a rule without constant regard for the policy or principle that animated its prescription, with appropriate regard for the factual constellation in the minds of the drafters.

This point bears emphasis. Legal statements, like all others, are made in a context whose features are part of the expectations of speaker and audience. The expression of article 2(4), in the form of a rule, is premised, I submit, on a political context and a technological environment which has been changing inexorably since the end of the 19th century. The rule assumes that the only threat to or usurpation of the right of political independence of a people within a particular territorial community is from external, overt invasion. It makes a historicistic assumption as well: internal changes are deemed to be personnel changes in the composition of an elite which do not bring about basic changes in systems of public order within the country or in its external political alignments; governments come and go but the life of the people continues in its traditional fashion. Most important, it does not presuppose division, maintained by a precarious nuclear equipoise, between two contending public order systems, either of which might find itself substantially disadvantaged and pressed to intense coercion by the defection of a particular community from its CDZ.

The rule formulation of article 2(4) is oblivious to these factors. Hence, its purpose notwithstanding, it has been unable to provide would-be strict appliers with a legal

characterization consistent with the relevant international policies for what are, alas, all too familiar scenarios. In communities without established or durably institutionalized procedures for the transfer of power, a group of military officers, without a base of popular support, seizes the government. In an equally familiar variation of this scenario, the putsch itself is externally inspired, encouraged and/or financed. As their control is precarious, the officers immediately seek the support of an outside superpower; it responds by providing military and administrative assistance within the country and material help and support in external political arenas. Because of this foreign reinforcement, what would probably have been an evanescent violation of the popular will persists. Ironically, most of the sequences of this scenario are compatible with traditional international law and article 2(4) as it has been mechanically applied. The usurpers of power are entitled to recognition as a government if they appear to have effective control, a doctrine established clearly since Chief Justice Taft's holding in *Tinocco*. As such, the new "government" is entitled to request assistance from abroad. Other governments responding to it are not deemed to be "intervening," yet another foreign force, entering the country, putting the mutinous military back in the barracks and reinstalling the ousted government and the former constitutional procedures would violate the terms of article 2(4). The net effect of a mechanical interpretation of article 2(4) may be to superimpose on an unwilling polity an elite, an ideology and an external alignment alien to its wishes. This may entail far-reaching social and economic changes and grave deprivations of human rights for substantial numbers and strata of the population. Recall that all of this occurs in a century whose politics are marked by relentless mass mobilization, with frequent, radical and far-reaching intervention by the apparatus of the state.

In consequential terms, the scenarios we have rehearsed are as destructive of the political independence of the community concerned as would be a massive invasion by the armed forces of another state. To characterize the second form of intervention per se as impermissible or unlawful and the first as permissible or lawful or at least not cognizable by international law violates the basic policy which international law seeks to achieve and rapes common sense. No international theory of interpretation worthy of the name can do this. Plainly, it is necessary to keep in the forefront the basic policy that animates article 2(4), and in each case in which its invocation is appropriate to try to secure an outcome as consistent as possible with it. It is not a question of writing obituaries for article 2(4) or hailing its miraculous remission but of devising appropriate methods for interpreting and applying it.

Coercion should not be glorified. The promulgation of a norm such as article 2(4) for all of its ineffectiveness is a major achievement. But it is naive and indeed subversive of public order to insist that coercion never be used, for it is a ubiquitous feature of all social life and a characteristic and indispensable component of law. In a decentralized international security system such as ours, the critical question is not whether coercion has been applied. It has been and inevitably will be in the future. The critical question is whether it has been applied in support of or against community order and basic policies, and whether it was applied in ways whose net consequences include increased congruence with community goals and minimum order. These considerations apply whether one speaks of diplomatic, ideological, economic or military coercion within a national community or between national communities.

Given the magnitude of destructive power of the weapons concerned and the violence and wickedness of which human beings have demonstrated themselves capable, the notion of ineffective international institutions and hence a decentralized security system is terrifying. But it is a fact. We do not enhance security, minimum order or

the values of human dignity which require and justify them by pretending otherwise any more than does an ostrich enhance his security by putting his head in the sand at the approach of danger. I believe that the possibility of making the security functions of the United Nations effective in the near future are slim. The effort to change this is always important and justified. But in the meanwhile, rational and responsible decisions will have to be made for the many cases that continue to present themselves to us. For them and more generally, the only control on impermissible coercion will be a clear conception of the licit community objectives for which coercion may be used: the basic and enduring values of contemporary world public order. This is a task for international lawyers. Let us apply ourselves to it.

#### ARTICLE 2(4) AND PERMISSIVE PRAGMATISM

*by Edward Gordon\**

It is unfortunate that in her remarks earlier today Ambassador Kirkpatrick chose to invoke the names of two former presidents of this Society, Myres S. McDougal and the late Harold D. Lasswell, and to emphasize their influence upon her own thinking and the foreign policy of the present administration. That policy, I am afraid, will have to be judged on its own merit—or lack of it. Borrowing the prestige of McDougal and Lasswell would have been unnecessary if the policy had real merit—and will not help appreciably if it has none.

But the substance of her remarks does serve the useful purpose of reminding us why the study of international law is so important. As T.D. Woolsey put it in his treatise on international law, published in 1874: "Every educated person ought to become acquainted with international law because he is a responsible member of the body politic and . . . because the executive if not controlled will be tempted to assume the province of international law for us."<sup>1</sup> Somehow we have allowed the executive to assume the province of international law for us. In my comments today, I would like to address a few aspects of this phenomenon.

I think it appropriate to begin with an observation made recently by Professor Georg Schwarzenberger in an essay which, coincidentally, appears in a book that deals with the teaching of international law.<sup>2</sup> Dr. Schwarzenberger refers to what he sees as a destructive trend among western international lawyers, a trend he characterizes as "permissive pragmatism." He does not single out American lawyers and legal scholars. But his point seems particularly well directed at what is sometimes said to be the Achilles heel of American legal realism, especially as manifest in the international law field in the jurisprudential approach favored by McDougal and Lasswell and those of us who have been influenced by their scholarship: namely, its unusually severe susceptibility to manipulation in the cause of whatever outcome one wishes to justify. What is lawful seems to be a function of the result one favors, rather than being a matter of compatibility with prevailing rules of law. The emphasis is upon primary values, at some cost, arguably too high a cost, to the stability and compelling authority of those mediating rules that most people have in mind when they speak of "the law." In effect, the complaint is that this kind of realism merges advocacy with objective analysis, with the latter usually falling victim to the influence of the former.

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<sup>1</sup>T.D. WOOLSEY, INTRODUCTION TO INTERNATIONAL LAW (1874) 355 (Rothman reprint 1981).

<sup>2</sup>Schwarzenberger, *International Law and the Problems of Political World Order: Inter-Disciplinary Working Hypotheses and Perspectives*, in INTERNATIONAL LAW: TEACHING AND PRACTICE 62 (B. Cheng ed. 1982).